Supreme Court, U.S.
FILED
MAR 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-874

In The

# Supreme Court of the United States

OCTOBER TERM, 1985

HACKNEY, INC., AND WAYNE SCHWEDLAND

*Petitioners,*

*v.*

WILLIAM H. BROCK, Secretary of Labor,
United States Department of Labor,

*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## REPLY BRIEF OF PETITIONERS

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Come now Petitioners, HACKNEY, INC. and WAYNE SCHWEDLAND, by and through their counsel of record, and file this, Reply to Brief for the Respondent in Opposition, and would respectfully show the Court as follows:

### Improper Form of Respondent's Brief in Opposition

Petitioners would initially show the Court that Brief for the Respondent in Opposition fails to comply with Rule 22.5, United States Supreme Court Rules, in that it disregards Supreme Court Rule 33 concerning form of briefs. Brief for the Respondent in Opposition, as furnished to

Petitioners, is not printed, and fails to comply with Rules 33.1(b), (c) and (d) concerning size of print, duplication, and dimensions of pages and printed matter. The Supreme Court has ruled that the Clerk will be instructed not to accept for record or filing a document which fails to conform to the requirements of the Supreme Court Rules, unless the party files a motion to dispense with printing or other form requirements.[1] Respondent has also failed to include a Table of Contents and a Table of Authorities, as specifically required by Rule 33.5(a) and (b), for all documents which exceed three pages. For these reasons, Petitioners respectfully request the Court to not accept for record or filing Brief for the Respondent in Opposition.

**Argument and Authorities**

Several matters of substance in the Brief for the Respondent in Opposition require reply.

Respondent's wayward brief fails to recognize the language of the Fourth Amendment that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized."[2] The warrant packet submitted to the Magistrate in the instant case fails to pass this constitutional muster. The information submitted to the Magistrate, particularly the affidavit of James E. Brown, III, provided no basis for the determination by the courts below that probable cause existed. The affidavit contains no affirmative

[1]*See, Snider v. All State Administrators, Inc.*, 414 U.S. 685, 686, 39 L. Ed. 2d 90, 92, 94 S. Ct. 771 (1974).

[2]U. S. Constitution, Amendment IV.

allegation that the affiant spoke with personal knowledge of the matters contained in such affidavit, as required by *Giordenello v. United States.*[3] By applying the four corners doctrine set out in *Franks,* and accepting the validity of a warrant not based on personal knowledge, the courts below render Petitioner's Fourth Amendment rights meaningless. To rule that probable cause exists in light of such an affidavit, is to remove the Magistrate as guardian of Petitioners' Fourth Amendment rights and establish him as a rubber stamp in the administrative process.

Respondent, in an effort to diminish a conflict between the instant cause and *Mosher Steel-Virginia v. Eva S. Teig, Commissioner of Labor,* 327 S. E. 2d 87, 12 BNA OSHC 1217 (Va. 1985), mischaracterizes the principal holding in the latter case as "dictum."[4] The exact holding of the Virginia Supreme Court reads as follows:

> "We hold that an employer need not make a *Franks* showing to contest the validity of a warrant and its underlying plan for a general inspection by adducing evidence beyond the limits of the supporting affidavit. An employer who challenges the plan on which the general inspection warrant is based is entitled to seek a pre-search declaratory judgment to determine the constitutional validity of the plan. We acknowledge that this holding may result in frustrating delays in the

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[3]Respondent repeatedly argues for use of an admittedly criminal standard that limits review of the warrant packet to the four corners of the affidavit as set out in *Franks v. Delaware,* 438 U. S. 154. Respondent, however, fails to acknowledge the application of other Fourth Amendment principles which have arisen in criminal cases. Foremost among these is that any warrant must contain an affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein. *Giordenello v. United States,* 357 U. S. 480, 486 (1958).

[4]Brief for the Respondent in Opposition (hereinafter "Resp.__") pp. 12-13.

> enforcement of Occupational Safety & Health laws, but the constitutional principle at stake is of overriding importance."[5] [Citations and footnote omitted]

The conflict between the two cases and the language of the Virginia Supreme Court could not be clearer.

Respondent further incorrectly asserts that the "argument pressed by Petitioners [herein] is indistinguishable from the claim considered by the Court in *Franks*."[6] The arguments in the two cases are clearly distinguishable. *Franks* presented a post-search challenge to a *criminal* warrant, with the holding of that case narrowly confined to a "criminal proceeding."[7]

The instant case involves a declaratory judgment action under 28 U.S.C. Section 2201 that goes *beyond* the warrant and challenges OSHA's entire administrative inspection plan. The instant case involves a pre-search challenge of both the warrant issued, and the administrative plan allegedly being followed.

The decision of the Appeals Court to embrace the application of *Franks* in this setting prevents, rather than permits, the vigorous inquiry required to determine the accuracy of the factual affidavit supporting a warrant application. Applying *Franks* in this context prevents any real judicial inquiry whatsoever into the Secretary's plan and makes the Magistrate nothing more than a rubber stamp for an OSHA affiant's boilerplate affidavit. When, as here, the affidavit is not sworn on personal knowledge, the application of *Franks* prevents an employer from determining what *facts*, if any, are within the personal knowledge of the affiant, and are true and correct. Unlike the traditional warrant, which

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[5]327 S. E. 2d 87 (Va. 1985).

[6]Resp. p. 10

[7]*Franks v. Delaware*, 438 U. S. at 155.

is based on specific evidence, the inspection warrant contemplated by the Respondent provides no protection against the search itself for an employer, like Hackney, who the government has no historical probable cause basis to suspect is violating the OSHA regulations.

Application of *Franks*, in a non-criminal environment, to a warrant based on an inspection plan rather than a specific complaint, renders the warrant requirement set out in *Barlow's* meaningless. It prevents the regulated employer from ever determining through the adversary process how a given administrative plan is created, and how it is applied to the employer. By foreclosing inquiry beyond the scope of *Franks*, and by permitting affidavits by OSHA affiants to be "sworn" without personal knowledge, an employer's Fourth Amendment rights are sacrificed at the altar of administrative expediency. It is just such a warrant that the Framers feared,[8] and which the dissent of Justice Stevens anticipated in *Barlow's*.[9]

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[8]*See*, T. Taylor, Two Studies in Constitutional Interpretation, 41 (1967);

[9]*Marshall v. Barlow's, Inc.*, 436 U. S. 307, 327-28 (1978).

## CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully pray the Writ of Certiorari be granted and that the parties be directed to brief and argue the questions presented in the Petition.

Respectfully submitted,

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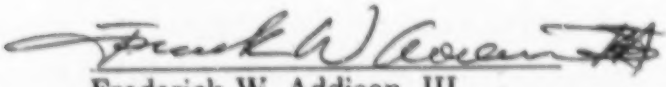

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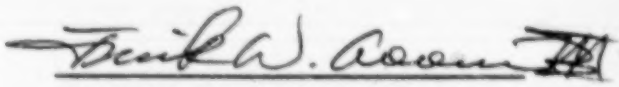
## CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 1986, three copies of this Reply Brief of Petitioners were placed in the United States Mail, certified, return receipt requested, postage prepaid, to counsel for all parties required to be served, said parties being Charles Fried, the Solicitor General, Department of Justice, Washington, D.C. 20530, and one copy to Andrea Casson, U. S. Department of Labor, Room S 4004, Washington, D.C. 20210.



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